In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 608

LOUIS PIZITZ DRY GOODS COMPANY, INC., PETITIONER

v.

E. L. DEAL, K. T. TYREE, AND EDWARD N. HAMMILL, EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY J. WILLINGHAM, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 103-110) is not reported. The opinion of the Court of Appeals (R. 120-127) is reported at 208 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1953. (R. 128.) Taxpay-

er's petition for rehearing was denied on February 3, 1954. (R. 144.) The petition for a writ of certiorari was filed on March 1, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's decision holding that the taxpayer failed to file timely elections for the taxable years ending January 31, 1942, through January 31, 1947, to apply the involuntary liquidation and replacement provisions of Section 22(d)(6) of the Internal Revenue Code and was not, therefore, entitled to its benefits.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code and the Regulations thereunder are set forth in the Appendix, *infra,* pp. 12-22.

STATEMENT

The pertinent facts in this case, as set forth in the District Court's opinion (R. 103-110), may be summarized as follows:

The taxpayer is an Alabama corporation that operated a large mercantile department store in Birmingham, Alabama. In the course of its business, the taxpayer used the accrual method of accounting and kept its inventory records according to authorized inventory procedure. The taxpayer included in its income tax return for the year ended January 31, 1942, a statement of elec-

tion to use the elective method of computing inventories provided by Section 22(d)(1)(B) of the Internal Revenue Code and in accordance with its election the taxpayer used the "last-in, first-out" or "Lifo" method of computing inventories in the returns it filed for each of the taxable years. (R. 103-104.)

The taxpayer's election was filed on Form 970 and included the following statement (R. 104):

> The taxpayer hereby agrees to such adjustments incident to the change to the elective method, or to the use of such method, or to any later change from such method, in the inventories of prior taxable years or otherwise, as the Commissioner of Internal Revenue upon the examination of the taxpayer's returns for the years involved may deem necessary in order that the true income of the taxpayer may be clearly reflected.
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> * * * * *
>
> The taxpayer has applied the retail inventory method, adjusted to the last-in, first-out basis by using indices of price changes, developed for the individual departments, based upon the company's own experience in determination of cost.

In January, 1946, the Commissioner determined that the taxpayer's use of "Lifo" did not clearly reflect income, and proposed a deficiency against the taxpayer for each of the years involved. However, after a protest by the taxpayer

and a field conference, the taxpayer was permitted to use "Lifo." (R. 104.)

Until after the decision in *Hutzler Brothers Co. v. Commissioner,* 8 T. C. 14, the Commissioner issued no regulations with respect to the computation under the elective method by a taxpayer using the retail inventory method. In 1948 such regulations were issued. On March 9, 1948, the Commissioner issued Mim. 6244, 1948-1 Cum. Bull. 21, which stated in part (R. 105):

> Retailers who have filed, on the basis of the elective method, returns for past years which are still open, and who used indices that are not acceptable to the Commissioner, may file amended returns employing acceptable indices.

On September 18, 1948, the taxpayer filed amended returns for the years ended January 31, 1942, through January 31, 1947, and with these returns, for the first time, filed an election to have applied for each year involved the involuntary liquidation and replacement provisions of Section 22(d)(6) of the Internal Revenue Code. (R. 105.)

In the District Court, both parties filed motions for summary judgment with accompanying exhibits. (R. 48-79, 98-102.) The court granted the Collector's motion, holding that the taxpayer was not entitled to the claimed benefits of Section 22(d)(6) for the taxable years in questions because it had failed to file timely elections to apply its provisions. (R. 103-110.) The Court of Appeals

affirmed. (R. 128.) The taxpayer's petition for a rehearing (R. 129-143) was denied (R. 144).

ARGUMENT

This case does not warrant further review. Contrary to the assertion of the taxpayer (Pet. 7-8), the decision is clearly correct and does not involve a question of general importance which should be settled by this Court. Moreover, there is no conflict between Circuits.

1. While the taxpayer alleges that this case involves questions of general importance, its petition fails to show that the decision will affect any pending case or that it has any importance beyond this case. As will appear more fully, *infra*, the peculiar facts of the case present a narrow issue which does not merit review by this Court.

2. The decision of the Court of Appeals affirming the District Court is correct. The taxpayer in effect concedes that under the Treasury Regulations 111, Section 29.22(d)-7, as amended by T.D. 5841, 1951-1 Cum. Bull. 11 (Appendix, *infra*, pp. 18-20), its elections to apply the involuntary liquidation and replacement provisions of Section 22(d)(6) of the Internal Revenue Code (Appendix, *infra*, pp. 12, 14-18) for the taxable years ending January 31, 1942, through January 31, 1947, were untimely.[1] The taxpayer contends (Pet. 9-11),

[1] The purpose of the involuntary liquidation and replacement election was to permit taxpayers whose inventories had, because of war conditions, become depleted to elect to make future adjustments in their returns if, within a specified time, their inventories should be replaced.

however, that under the plain meaning of Section 22(d)(6)(A) as amended by the Act of September 5, 1950, c. 581, 64 Stat. 592, it was the intention of Congress to allow *all* taxpayers who could have elected to apply the benefits of Section 22(d)(6), but who failed to do so, a reasonable period of time after the enactment of the 1950 amendment to file amended returns for prior years applying its provisions. And, taxpayer continues (Pet. 11-12), in holding that its elections were untimely, the Court of Appeals has given Section 22(d)(6) as implemented by Section 29.22(d)-7 of Regulations 111 to require that an election be made not later than "6 months after the time of filing his income tax return for the year of the liquidation" an unconstitutional construction. There is clearly no merit to the taxpayer's contentions.

Certainly the plain meaning of the words "at such time and in such manner" as they were added by the 1950 amendment to Section 22(a)(6)(A) do not, as the taxpayer contends (Pet. 10), require the Commissioner to issue regulations permitting *all* taxpayers who used the "last-in, first out" or "Lifo" inventory method as provided by Section 22(d)(1) of the Internal Revenue Code (Appendix, *infra,* p. 12) for the years beginning after December 31, 1940, and ending before January 1, 1948, to elect to apply within a reasonable period of time after the enactment of the 1950 amendment its involuntary liquidation and replacement provisions. To determine what Congress actually intended in using that language it is necessary to ex-

amine the legislative history of the 1950 amendment to Section 22(d)(6).

Under the 1950 amendment to Section 22(d)(6) Congress eliminated the requirement that a taxpayer using the "Lifo" inventory method had to elect to apply the provisions of Section 22(d)(6) at the time of filing his return for the year of liquidation. It provided, instead, that the Commissioner was, under regulations approved by the Secretary of the Treasury, to prescribe the procedure by which a taxpayer could invoke the statute. The legislative history of the 1950 amendment shows clearly, as the Court of Appeals found (R. 126), that the intention of Congress was to authorize the Commissioner to issue regulations providing for relief in "hardship" cases. See S. Rep. No. 2366, 81st Cong., 2d Sess., and H. Rep. No. 2756, 81st Cong., 2d Sess. (U. S. Code Cong. Service, 81st Cong., 2d Sess., Vol 2, pp. 3576-3577). Nowhere in the legislative history of the 1950 amendment is there anything which indicates that Congress ever intended in using the words "at such time and in such manner" to permit *all* taxpayers who used the "Lifo" inventory method but who failed to elect to apply the involuntary liquidation and replacement provisions of Section 22(d) (6) to file amended returns applying its provisions, thereby reopening years long closed.

Under the circumstances it is immaterial whether Section 29.22(d)-7 of Regulations 111 fully implements the intention of Congress under the 1950 amendment to Section 22(d)(6) of the Code be-

cause the taxpayer obviously does not, as the Court of Appeals found (R. 126-127), fall within the hardship category at which the amendment was aimed.[2] In filing its original income tax return for the year ending January 31, 1942, the taxpayer included in the return a statement of election to use the "Lifo" method of computing inventories and it used that method in the original returns filed for each of its taxable years through January 31, 1947, but it did not attempt to avail itself in those returns of the privilege of applying the benefits of Section 22(d)(6). It was not until September 18, 1948, more than six months after it filed the last of its original returns for these years, that the taxpayer filed amended returns with elections to apply the involuntary liquidation and replacement provisions of Section 22(d)(6). Taxpayer's elections to apply Section 22(d)(6) were untimely at the time they were filed and their untimeliness was not intended by Congress to be remedied under the 1950 amendment. The Court of Appeals was correct in rejecting the taxpayer's contention that it was prejudiced by the Commissioner's having taken the position that taxpayers using the retail inventory method could not use the "Lifo" inventory method of Section 22(d)(1) until after the Tax Court's

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[2] Moreover, if, as we contend, Congress did not in the 1950 amendment to Section 22(d)(6) make mandatory or automatic an extension of time for the exercise of the election under the circumstances of this case, then discretion was vested in the administrative authorities, and however harsh the denial of relief in a particular case may seem, the remedy lies in an appeal to Congress and not to the Courts. Cf. *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 468-469.

decision in *Hutzler Brothers Co.* v. *Commissioner,* 8 T.C. 14, when, in 1948, it issued Mim. 6244 (1948-1 Cum. Bull. 21). There is not in this record the slightest indication that the present taxpayer was misled in regard to its rights because of the confusion which existed for a time with respect to the use of the "Lifo" method. Having in fact elected to use the "Lifo" inventory method over the Commissioner's objection, the taxpayer could, as the Court of Appeals said (R. 124), just as well have invoked the involuntary liquidation and replacement provisions of Section 22(d)(6) when it filed its original returns for the years in issue.

There is also no merit to the taxpayer's contention (Pet. 8) that the Court of Appeals erred in construing Section 39.22(d)-7 of Treasury Regulations 118 (Appendix, *infra,* pp. 21-22) as not remedying the untimeliness of its elections to invoke the involuntary liquidation and replacement provisions of Section 22(d)(6). Taxpayer's contention is untenable for two reasons. First, as the court below observed (R. 127), Section 39.1-1 of Treasury Regulations 118 (Appendix, *infra,* p. 21) expressly provides that Chapter 1 of Regulations 118 is applicable "only with respect to taxable years beginning after December 31, 1951." And, secondly, it is clear that Section 39.22(d)-7 was taken from Section 29.22(d)-7 of Regulations 111 and revised so as to be applicable only with respect to taxable years beginning after December 31, 1951. Section 29.22(d)-7 of Regulations 111 provides that a taxpayer must notify the Commissioner that he in-

tends to invoke the involuntary liquidation and replacement provisions of Section 22(d)(6) not later than six months after filing his income tax return for the year of liquidation "or at any time not later than December 15, 1952, in the case of the year of liquidation being a taxable year ending after June 30, 1950, and before March 1, 1952."[3] In revision, the words "after June 30, 1950, and" were omitted from this phrase in Section 39.22(d)-7 of Regulations 118 to conform with Chapter 1 of Regulations 118, being applicable only as to years beginning after December 31, 1951. Admittedly this does mean, as the taxpayer points out (Pet. 13), that "taxable year" as used in that phrase in Section 39.22(d)-7 is a two month period. The purpose of this was, however, to protect calendar year taxpayers who changed over to a fiscal year basis during the period of January 1, 1952, to March 1, 1952, and elected to apply the involuntary liquidation and replacement provisions of Section 22(d)(6).

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[3] Section 22(d)(6)(F) (Appendix, *infra*, pp. 17-18) was added to Section 22(d)(6) by the Act of January 11, 1951, c. 1227, 64 Stat. 1244, to permit elections to apply the provisions of Section 22(d)(6) to be made for taxable years ending after June 30, 1950, and prior to January 1, 1954.

CONCLUSION

The decision below is correct. There is no conflict in decisions and no other reason appears which would warrant further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(c) *Inventories.*—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

(d) [As amended by Section 219(a), Revenue Act of 1939, c. 247, 53 Stat. 862] (1) A taxpayer may use the following method (whether or not such method has been prescribed under subsection (c)) in inventorying goods specified in the application required under paragraph (2):

(A) Inventory them at cost;

(B) Treat those remaining on hand at the close of the taxable year as being: First, those included in the opening inventory of the taxable year (in the order of acquisition) to the extent thereof, and second, those acquired in the taxable year; and

(C) Treat those included in the opening inventory of the taxable year in which such method is first used as having been acquired at the same time and determine their cost by the average cost method.

(2) The method described in paragraph (1) may be used—

(A) Only in inventorying goods (required under subsection (c) to be inventoried) specified in an application to use such method filed at such time and in such manner as the Commissioner may prescribe; and

* * * * *

(3) The change to, and the use of, such method shall be in accordance with such regulations as the Commissioner, with the approval of the Secretary, may prescribe as necessary in order that the use of such method may clearly reflect income.

* * * * *

(5) If a taxpayer, having complied with paragraph (2), uses the method described in paragraph (1) for any taxable year, then such method shall be used in all subsequent taxable years unless—

(A) With the approval of the Commissioner a change to a different method is authorized; or

* * * * *

In either of the above cases, the change to, and the use of, the different method shall be in accordance with such regulations as the Commissioner, with the approval of the Secretary, may prescribe as necessary in order that the use of such method may clearly reflect income.

(6) [As added by Section 119, Revenue Act of 1942, c. 619, 56 Stat. 798; amended by Section 110 (a), Revenue Act of 1943, c. 63, 58 Stat. 21; Act of September 5, 1950, c. 851, 64 Stat. 592; and Section 1 of the Act of January 11, 1951, c. 1227, 64 Stat. 1244] *Involuntary liquidation and replacement of inventory.*—

(A) *Adjustment of net income and resulting tax.—Years beginning prior to January 1, 1948.*—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it established to the satisfaction of the Commissioner, in accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1953, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

(i) Increased by an amount equal to the excess, if any, of the aggregate cost of

such goods reflected in the opening inventory of the year of involuntary liquidation over the aggregate replacement cost; or

(ii) Decreased by an amount equal to the excess, if any, of the aggregate replacement cost of such goods over the aggregate cost thereof reflected in the opening inventory of the year of the involuntary liquidation.

The taxes imposed by this chapter and by chapter 2 for the year of such liquidation, for preceding taxable years, and for all taxable years intervening between the year of liquidation and the year of replacement shall be redetermined, giving effect to such adjustments. Any increase in such taxes resulting from such adjustments shall be assessed and collected as a deficiency but without interest, and any overpayment so resulting shall be credited or refunded to the taxpayer without interest.

(B) *Definition of Involuntary Liquidation.*—The term "involuntary liquidation", as used in this paragraph, means the sale or other disposition of goods inventoried under the method described in this subsection, either voluntary or involuntary, coupled with a failure on the part of the taxpayer to purchase, manufacture, or otherwise produce and have on hand at the close of the taxable year in which such sale or other disposition occurred such goods as would, if on hand at the close of such taxable year, be subject to the application of the provisions of this subsection, if such failure on the part of the tax-

payer is due, directly and exclusively, (i) to enemy capture or control of sources of limited foreign supply; (ii) to shipping or other transportation shortages; (iii) to material shortages resulting from priorities or allocations; (iv) to labor shortages; or (v) to other prevailing war conditions beyond the control of the taxpayer.

* * * * *

(D) [As amended by Section 110(a), Revenue Act of 1943, *supra*] *Election Irrevocable.*—An election by the taxpayer to have the provisions of this paragraph apply, once made, shall be irrevocable and shall be binding for the year of the involuntary liquidation and for all determinations for prior and subsequent taxable years insofar as they are related to the year of liquidation or replacement.

(E) *Adjustment in Certain Cases.*—If the adjustments specified in subparagraph (A) are, with respect to any taxable year, prevented, on the date of the filing of the income tax return of the taxpayer for the year of the replacement, or within three years from such date, by any provision or rule of law (other than this subparagraph and other than section 3761, relating to compromises), such adjustments shall nevertheless be made if, in respect of the taxable year for which the adjustment is sought, a notice of deficiency is mailed or a claim for refund is filed, as the case may be, within three years after the date of the filing of the income tax return for the year of replacement. * * *

(F) [As added by Section 2 of the Act of January 11, 1951, *supra*] *Years Ending After June 30, 1950, and Prior to January 1, 1954.*

(i) *Adjustment of Net Income and Resulting Tax.*—If, for any taxable year ending after June 30, 1950, and prior to January 1, 1954, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it is established to the satisfaction of the Commissioner, in accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B) (as modified by clause (ii) of this subparagraph), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1956, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidations shall be increased by an amount equal to the excess, if any, of the aggregate cost of such goods reflected in the opening inventory of the year of involuntary liquidation over the aggregate replacement cost, or decreased by an amount equal to the excess, if any, of the aggregate replacement cost of such goods

over the aggregate cost thereof reflected in the opening inventory of the year of the involuntary liquidation. The taxes imposed by this chapter and by chapter 2 for the year of such liquidation, for preceding taxable years, and for all taxable years intervening between the year of liquidation and the year of replacement shall be redetermined, giving effect to such adjustments. Any increase in such taxes resulting from such adjustments shall be assessed and collected as a deficiency but without interest, and any overpayment so resulting shall be credited or refunded to the taxpayer without interest.

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(d)-7 [As amended by T.D. 5841, 1951-1 Cum. Bull. 11, 14, and T.D. 5932, 1952-2 Cum. Bull. 76, 79] *Involuntary Liquidation and Replacement.*—If prevailing war conditions beyond the control of the taxpayer, or certain prescribed postwar conditions beyond his control, should render it impossible either during the period of the war or within the prescribed postwar period for a taxpayer using the elective inventory method to have on hand at the close of the taxable year a stock of merchandise in kind and description like that included in the opening inventory for the year, or in a quantity equal to that of the opening inventory, the resulting inventory decrease for the year will be regarded, at the election

of the taxpayer, as reflecting an involuntary liquidation subject to replacement. If the taxpayer notifies the Commissioner at any time not later than 6 months after the time of filing his income tax return for the year of the liquidation, or at any time not later than December 15, 1952, in the case of the year of liquidation being a taxable year ending after June 30, 1950, and before March 1, 1952, * * * that he intends to effect a replacement of the liquidated stock, in whole or in part, and that he desires to have applied in his case the involuntary liquidation and replacement provisions of section 22(d)(6), and if he establishes to the satisfaction of the Commissioner the involuntary character of the liquidation to which his stock has been subjected, effect shall be given, when replacement has been made, to an adjustment of net income for the year of liquidation to the extent of the difference between the replacement costs incurred and the original inventory cost of the base stock inventory liquidated. (For extensions of time, see subpart H * * *, as added by Treasury Decision 5391 [C. B. 1944, 474], approved July 14, 1944, and amended by Treasury Decision 5400 [C. B. 1944, 476], approved August 22, 1944).

* * * * *

If the taxpayer would have the involuntary liquidation and replacement provisions applicable with respect to any inventory decrease, he must so elect within the time prescribed by these regulations. In making such election, the taxpayer shall attach to his return and

make a part thereof, or he shall furnish separately to the Commissioner, a statement setting forth the following matters: (1) the wish of the taxpayer to invoke the involuntary liquidation and replacement provisions; (2) a detailed list or other identifying description of the items of merchandise claimed to have been subjected to involuntary liquidation and the extent to which replacement is intended; (3) the circumstances relied upon as rendering the taxpayer unable to maintain throughout the taxable year a normal inventory of the items involved, including evidence of the applicable National Production Authority inventory control figures for the beginning and the close of the taxable year (or if none, a statement to that effect), allotments applied for, allotments received, and reason for failure to place allotments received; (4) detailed proof of such circumstances to the extent that they may not be the subject-matter of common knowledge; (5) a full description of what efforts were made on the part of the taxpayer to effect replacement during the taxable year and the result of such efforts; and (6) in the case of an election made pursuant to an extension of time sought under subpart H more than 6 months after the filing of the return for the year of liquidation, the circumstances relied upon as justifying the election at such time, together with a disclosure of the extent, if any, to which replacements have already been made.

* * * * *

Treasury Regulations 118, promulgated under the Internal Revenue Code:

Sec. 39.1 *Statutory provisions; application of Chapter 1.*

* * * * *

Sec. 39.1-1. *Scope and applicability of regulations.* (a) The regulations in this part deal with (1) the taxes imposed by chapter 1 of the Internal Revenue Code, except the excess profits tax imposed under subchapter D, (2) the surtax imposed by subchapter A of chapter 2 (sections 500 to 511, inclusive) upon the undistributed subchapter A net income of personal holding companies, and (3) administrative provisions relating to such taxes.

(b) The regulations in this part are applicable only with respect to taxable years beginning after December 31, 1951.

Sec. 39.22(d)-7 *Involuntary liquidation and replacement.* (a) If prevailing war conditions beyond the control of the taxpayer, or certain prescribed post-war conditions beyond his control, should render it impossible either during the period of the war or within the prescribed post-war period for a taxpayer using the last-in first-out inventory method to have on hand at the close of the taxable year a stock of merchandise in kind and description like that included in the opening inventory for the year, or in a quantity equal to that of the opening inventory, the resulting inventory decrease for the year will be regarded, at the election of the taxpayer, as reflecting an involuntary liquida-

tion subject to replacement. If the taxpayer notifies the Commissioner at any time not later than six months after the time of filing his income tax return for the year of the liquidation, or at any time not later than December 15, 1952, in the case of the year of liquidation being a taxable year ending before March 1, 1952, that he intends to effect a replacement of the liquidated stock, in whole or in part, and that he desires to have applied in his case the involuntary liquidation and replacement provisions of section 22(d)(6), and if he establishes to the satisfaction of the Commissioner the involuntary character of the liquidation to which his stock has been subjected, effect shall be given, when replacement has been made, to an adjustment of net income for the year of liquidation to the extent of the difference between the replacement costs incurred and the original inventory cost of the base stock inventory liquidated. For extensions of time, see Subpart G of the regulations in this part.
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